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THAT '70S SHOW: EMINENT DOMAIN REFORM AND THE ADMINISTRATIVE LAW REVOLUTION

Eric R. Claeys*

I. INTRODUCTION

This article proposes to update eminent domain law, at least to the 1970s. While the 1970s are more popularly remembered for disco and bell-bottoms, among hard-core legal practitioners they are famous for changing the practice of administrative law. For most of the twentieth century, administrative enabling statutes tended to give administrative agencies broad policy-making discretion and to limit substantially judicial review of those agencies' policy choices. During the late 1960s and early 1970s, however, lawyers and scholars soured on this extremely optimistic and centralized model of government administration. They worried that the moneyed interests regulated by government often shaped the regulations that bound them—in many cases, these interests even captured the regulators. During the 1970s, in federal and state law, including the law of zoning, courts developed hybrid doctrines of judicial review to limit regulators' discretion to depart from the so-called "public interest" to advance so-called "special interests."

This article has three simple theses: first, this administrative-law revolution has not yet influenced the law of eminent domain, blight, and property redevelopment; second, it should; and, third, the debate over *Kelo v. City of New London*¹ provides a convenient opportunity to do so. As Thomas Merrill observed while testifying before the U.S.

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1. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

Senate Committee on the Judiciary, from the perspective of “an administrative law professor,” eminent domain proceedings seem “outmoded.”² Merrill’s observation deserves to be fleshed out more fully in a scholarly setting. Even now, many state urban-renewal laws reflect substantial optimism toward centralized planning. Such optimism prevailed during the first half of the twentieth century, but fell out of favor during the 1960s and 1970s. Contemporary administrative law doctrine and scholarship still both give administrative agencies broad substantive deference, but they give agencies far less procedural deference than they did before 1960. Administrative law’s procedural and judicial doctrines thus provide a middle road for reforming eminent-domain practices.

This article therefore teaches two lessons. The first is practical. This article may help policy specialists, grass-roots activists, and legislators think more imaginatively when reforming eminent-domain practice. *Kelo* clearly suggests that important political constituencies are dissatisfied with eminent domain, but it is not yet clear exactly what problems animate the dissatisfaction, or what kinds of laws will solve the dissatisfaction. Many, if not most, legislative proposals drafted to respond to *Kelo* have been substantive; in other words, they have focused on the merits of the conflict between economic redevelopment and property rights. The proposals discussed in this article are not substantive but procedural. Because they are procedural, they may be not only constructive but also less controversial and difficult to enact than substantive reforms.

The second lesson is theoretical. This article helps integrate the specific debate about post-*Kelo* eminent domain into the broader literature on administrative law theory. When eminent domain specialists try to strike a balance between economic development and the dangers of development pressure, they borrow administrative law themes regarding the tension between vigorous government action and public-choice pressures. This connection deserves

2. *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Professor Thomas W. Merrill, Columbia Univ.), available at http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661.

to be made more explicit.

This article proceeds in two parts. Part II briefly reviews the range of substantive alternatives available in the eminent domain debate.³ Part III then explains why the procedural administrative law reforms considered here provide a legislative middle ground between the various substantive alternatives.⁴

II. THE POLICY ISSUES IN PUBLIC-USE CONTROVERSIES

In *Kelo*, the Supreme Court held that a local government does not violate the federal Public Use Clause⁵ when it condemns private homes and assigns them to a private developer in the course of a comprehensive plan to generate more jobs, taxes, and general economic growth.⁶ This decision sparked broad popular outrage, which in turn provoked many state legislatures to reconsider their eminent domain laws.

To date, the most prominent post-*Kelo* legislation reconsiders *Kelo* on its substantive merits. *Kelo* raises questions about the legitimacy of “private-to-private” transfers, by which I mean condemnations in which the government condemns privately owned land and then reassigns it to a private developer so that the developer may then generate broader public benefits.⁷ In this section, I survey the main alternatives by which private-to-private transfers can be evaluated on the merits. Along the way, I illustrate each alternative through the use of prominent case opinions and legislation.

To provide a brief survey of the basic substantive alternatives, I rely on Thomas Merrill’s 1986 article, *The Economics of Public Use*.⁸ Before proceeding, let me state that I and others disagree with Merrill’s evaluation of the

3. See discussion *infra* Part II.

4. See discussion *infra* Part III.

5. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

6. *Kelo*, 125 S. Ct. at 2655.

7. See *id.* at 2678-79.

8. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). For other restatements, readers may want to consider RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 54-60 (6th ed. 2003), and Ilya S. Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, SUP. CT. ECON. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874865.

merits of private-to-private transfers, and I prefer to discuss property policy issues in philosophical terms rather than Merrill's economics terms.⁹ I use economic terms here because they are more accessible and familiar to most readers. I use Merrill's terms in particular because they identify what most observers agree are the policy considerations central to eminent domain.¹⁰

On one side of Merrill's taxonomy, private-to-private transfers hold out the promise of reducing the costs of private land assemblies. Private sellers may try to hold out to extract a share of the surplus a developer tries to create from assembling land.¹¹ Eminent domain breaks up those sellers' hold-out power.¹² Blight and redevelopment statutes therefore help localities avoid the "type I" error of too few efficient private land assemblies.

On the other hand, blight and redevelopment statutes create three different sources of "type II" error, which is to say, too many *inefficient* private land assemblies. The first source is the "subjective valuation" problem that standard fair-market-value compensation rules may fail "to compensate the condemnee for . . . the subject 'premium' he might attach to his opportunity cost."¹³ The second is the "secondary rent-seeking" problem: if eminent domain is made broadly available to facilitate private assemblies, it may

9. See, e.g., Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2004) (hereinafter Claeys, *Public-Use Limitations*); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2002-2003) (hereinafter Claeys, *Takings*).

10. See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 48 (1995); John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 44-46 (2005); Trent Christensen, *From Direct "Public Use" to Indirect "Public Benefit": Kelo v. New London's Bridge from Rational Basis to Heightened Scrutiny for Eminent Domain Takings*, 2005 B.Y.U. L. REV. 1669, 1696 (2005); Benjamin D. Cramer, *Eminent Domain for Private Development—An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, 411 (2004); Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAWAII L. REV. 421, 427 (1998); Lionel Marks Lavenue, *Patent Infringement Against the United States and Government Contractors Under 28 U.S.C. § 1498 in the United States Court of Federal Claims*, 2 J. INTEL. PROP. L. 389, 394 (1995).

11. See Merrill, *supra* note 8, at 75-77.

12. See *id.*

13. *Id.* at 83.

encourage “competing interest groups” to spend greater resources trying “to acquire or defeat a legislative grant of the power of eminent domain.”¹⁴ The last is the “market bypass” problem: lax public use standards may gradually undermine private land markets, as developers and other purchasers decide it is less costly to persuade a government to condemn land for redevelopment than it is to buy the land on open markets.¹⁵ In Merrill’s description, lax standards encourage buyers “either deliberately or negligently” to “bypass[] a thick market exchange.”¹⁶

It is not easy to balance these competing risks at the level of generality necessary to write legislation. Let me restate the more prominent substantive alternatives by explaining how they value each of the factors.

At one extreme end of the spectrum is near-total deference to legislatures. This view is informed by one or both of two comprehensive claims. First, in private land markets and in local government, there may be many more type I errors than type II errors. In other words, in many localities, land may be systematically underdeveloped because developers cannot by themselves overcome the hold-out problems created by negotiating with dozens of individual land owners. Second, city officials and planners may balance the type I and II errors much more expertly than courts. If one or both of these claims are true, local officials and planners should be afforded near-total deference.

Such deference is reflected in many eminent domain statutes. In Missouri, for instance, government officials may condemn land as blighted if they can establish “age, obsolescence, inadequate or outmoded design or physical deterioration” and also that “such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.”¹⁷ Many of these terms—say, “obsolescence,” “outmoded,” and “inability to pay reasonable taxes”—are so open-ended that city officials and planners may reasonably claim wide latitude to choose where and

14. *Id.* at 86.

15. *Id.* at 88.

16. *Id.*

17. MO. ANN. STAT. § 353.020(2) (West 2006); see also *id.* § 353.060 (empowering urban redevelopment corporations to deem land blighted and condemn it after proper public hearing).

when to condemn private land for private development. When courts review condemnations under such statutes, their review is similarly deferential.¹⁸ Condemnations are typically treated as legislative acts. In most jurisdictions, a government determination that condemnation promotes a valid public benefit is reviewed only for whether it is arbitrary, in bad faith, or the product of fraud or collusion.¹⁹

Both the statutes and the arbitrary and capricious standard of review were developed by lawyers with deferential attitudes toward administrative law and government regulation. As Wendell Pritchett has documented, modern urban-renewal programs were influenced substantially by early twentieth-century government theory.²⁰ This theory tended to be optimistic that urban planners could safely diagnose and cure "blight" consistent with their expertise. Some of this optimism came from early twentieth-century planning theory tinged with analogies to biology and ecology,²¹ some came from a confidence, bred in many social sciences in the first half of the twentieth century, in centralized economic planning.²²

At the other extreme, one might maintain that the type II errors are far more serious than the type I errors. Justice Clarence Thomas embraced this position in *Kelo*,²³ and Richard Epstein,²⁴ Ilya Somin,²⁵ and I²⁶ have defended it on its merits. Merrill's list of factors subtly, if unintentionally, suggests that the various factors are of roughly the same magnitude. I and others suspect, however, that the hold-out

18. See, e.g., *Kelo v. City of New London*, 843 A.2d 500, 556-57 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

19. See, e.g., *id.*; see also *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (Mo. Ct. App. 1991).

20. See Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

21. See *id.* at 14-17.

22. See *id.* at 18-19.

23. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting).

24. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161-81 (1985).

25. See generally Somin, *supra* note 8; Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 (2004).

26. See generally Claey's, *Public-Use Limitations*, *supra* note 9. I am grateful to Todd Zywicki for encouraging me to develop the ideas in this and the following paragraphs.

and subjective-valuation problems are fairly minor, while the market-bypass and rent-seeking problems are much more substantial. In our view, the hold-out and subjective-valuation problems operate at retail because they are project-specific. The market-bypass and rent-seeking problems, by contrast, operate at wholesale because they affect a locality's economy and political processes.

This skeptical view makes sense if it is generally true that local land markets and political processes are extremely dynamic, and that information about owners' uses and valuations is extremely diffuse and decentralized. These assumptions influence how one values the various error risks—but differently for different sources of error. To begin with, local planners and officials seem less competent than the affected parties to value the hold-out and subjective-valuation problems. Obviously, owners are likely to know their subjective value best, but they may underestimate a developer's position and they may also overstate their subjective value to hold out. Just as obviously, developers may appreciate the assembled value of land best, but they may understate owners' subjective values. Planners and city officials, by contrast, are too burdened to forecast *either* hold-out risks or subjective valuations with accuracy. They are not as close to the relevant land. They have only limited time to consider particular redevelopment proposals consistent with their other responsibilities. When they do consider particular proposals, much of the information they do get consists of conflicting and self-serving interpretations of the limited data provided by interested parties.

Most important, it can be difficult to quantify with precision the inefficiencies created by hold-outs or undercompensated subjective values. Like the "B," "P," and "L" in the Hand formula,²⁷ such policy values are easy to imagine, but hard to quantify concretely with reliable information in everyday life. Policy makers usually lack the concrete empirical information they would need to quantify such values. These algebraic factors improve decisions primarily by calling attention to problems that planners

27. See *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (stating that "B" = the burden of adequate precautions, "P" = the probability of an accident, and "L" = the loss).

should consider and at least try to quantify. But they by no means make planning as certain as algebra. Planning seems less realistic if planners must evaluate land assemblies with such uncertainty, in limited time, among parties with conflicting agendas, and on limited facts that the parties interpret to dramatically different conclusions.

Equally important, under these assumptions, the hold-out and subjective-valuation problems are not on the same order of magnitude as the market-bypass and rent-seeking problems. Public laws not only regulate and settle present disputes but also teach parties how to order their affairs for future disputes. Because most blight and redevelopment statutes leave local officials and planners with broad discretion, they encourage those officials, planners, and especially developers to test the limits of that discretion. In addition, if redevelopment policy requires local officials and planners to conduct as much guesswork as I am assuming here, developers may influence redevelopment policy considerably simply by presenting reasoned economic and policy analyses that fill in the holes in regulators' knowledge.

Taken together, these factors encourage developers, planners, and local officials to use condemnation procedures more often and private land markets less often. If not over the five-year horizon, over the thirty-year horizon, one would expect to see land markets soften in communities where eminent domain is used generously. In the process, it is reasonable to expect that rent-seeking increases considerably. Developers rationally prefer to give rent to local officials and planners if the rent costs less than the economic surplus they would need to share with home owners if they bargained with the home owners in a market not affected by the threat of condemnation. Of course, local majorities could frustrate these sorts of trends by opposing particular assembly projects. *Kelo* has galvanized just this opposition. However, as long as the standards for private transfers are generous, all sides will have credible legal and policy claims in favor of their positions. Political processes will therefore spend considerable time, money, and energy in conflict. These conflicts rationally diminish the social surplus created by land assemblies. Instead of sharing the surplus, the private parties dissipate it by litigating, giving competing rents to the government actors, and campaigning.

If these generalizations are good enough for government work, the law should limit private-to-private transfers substantially. Economic redevelopment laws should be either abolished or limited to pure cases of bilateral monopoly not the fault of either party to the bilateral stand-off.²⁸ “Blight” laws should also be rewritten to limit condemnations to occur only when there is documented evidence that a property creates a threat of crime or disease and that condemnation is necessary to wipe out the blight.²⁹ The interests that create demand for redevelopment also pressure interpretations of blight statutes so that the term “blight” is expanded substantially.

Although these prescriptions are at the extreme end of the substantive debate among academics, they are being enacted into law in at least a few jurisdictions. The Wisconsin legislature recently enacted a law protecting homeowners from blight condemnations. Substantively, this law does not change the standards for blight (deterioration, age, or obsolescence).³⁰ Procedurally, however, this bill protects the owners of dwelling properties by requiring governments to prove blight one home at a time, not by making a broad ruling on a neighborhood.³¹ The Georgia legislature has gone significantly further. Not only did it bar economic-redevelopment takings,³² it rewrote the state’s enabling legislation to limit blight condemnations to cases in which the government can prove that the property meets objective standards like uninhabitability, imminent harm to life, repeat illegal activity, and conduciveness to ill health, disease, infant mortality, or crime.³³ A separate provision specifically denies governments authorization to blight property on purely aesthetic grounds.³⁴ This provision repudiates case law, going back to the 1954 U.S. Supreme Court decision in *Berman v. Parker*, suggesting that the “public welfare” can promote values “spiritual as well as

28. See Claey's, *Public-Use Limitations*, *supra* note 9, at 919-28.

29. See EPSTEIN, *supra* note 24, at 178-80; Claey's, *Public-Use Limitations*, *supra* note 9, at 914-19.

30. WIS. STAT. ANN. § 32.06(6) (West 2006).

31. *Id.*

32. GA. CODE ANN. § 22-1-1 (West 2006).

33. *Id.*

34. See *id.*

physical, aesthetic as well as monetary.”³⁵

Of course, these laws, and the doubts I have sketched here, could all grossly overstate the risks of private-to-private transfers. Both the laws and the doubts are informed in large part from general assumptions that libertarians and conservatives make about the relative strengths and weaknesses of political and economic processes. These general assumptions could be wrong, or there could be compelling empirical data suggesting that the generalizations should not apply to eminent domain. If so, then it would be extreme and dogmatic to apply deductions from sweeping economic and political generalizations to frustrate local government. My point here is simply that neither extreme can be ruled out given what we know about eminent domain. Among other reasons, there are very few empirical studies about how eminent domain works in practice.³⁶

There are compromises between these two extremes. Another alternative is to favor broad deference in general, with “bite” in particular cases. According to this view, city officials and planners deserve deference when they balance the type I and II risks associated with redevelopment projects. There is a risk that planners and local officials may overestimate the type I problems and underestimate the type II problems. At the same time, there may be no compelling reason to believe that the risk is as systematic as Richard Epstein, I, or others would maintain. If not, there is no manageable doctrinal rule that legislatures can write or judges can develop interstitially to quantify a risk that is hard to pin down. The appropriate response is therefore for courts to use *ad hoc* review to keep local officials and planners from abusing the discretion they usually enjoy. By applying deferential review with “bite” in suspicious cases, courts strike the right balance between interfering with the planning process and making planners and local officials exercise their broad powers carefully.

Thomas Merrill takes this position, and he also suggests

35. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

36. For some of the studies that do exist, consider Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 104 MICH. L. REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875412, and Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976).

that it informs contemporary public use cases are decided in state courts. State public use law, Merrill argues, is best understood as a combination of two legal principles.³⁷ Doctrinally, courts give government public-use determinations near “rational basis” deference; but if the facts of a particular case suggest that a condemnation creates a serious risk of high subjective loss or secondary rent seeking, courts use *ad hoc* considerations to declare the condemnation to be an unconstitutional taking for private use.³⁸ Roughly five out of six public use challenges get ordinary rational basis deference; the sixth is invalidated on *ad hoc* grounds.³⁹

Another less deferential approach is to draw a firm line between “blight” transfers and economic-redevelopment transfers. Justice Sandra Day O'Connor advocated this approach in *Kelo*⁴¹ the Michigan Supreme Court made it Michigan law in *County of Wayne v. Hathcock*.⁴² This approach has captured the interest of many state legislatures since *Kelo*. In August 2005, for instance, the Alabama legislature made it illegal for local governments to “condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”⁴³ In September 2005, Texas barred local governments from using eminent domain to “confer[] a private benefit on a particular private party through the use of the property,” or “for a public use that is merely a pretext to confer a private benefit on a particular private party; or . . . for economic development purposes.”⁴⁴

37. See Merrill, *supra* note 8, at 115.

38. See *id.* at 108.

39. See *id.* at 96; Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 REAL PROP. PROB. & TR. J. 251 (2004).

41. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2674–75 (2005) (O'Connor, J., dissenting).

42. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

43. ALA. CODE § 11-47-170(b) (2005).

44. TEX. GOV'T CODE ANN. § 2206.001(b) (Vernon 2005). One other feature of the Texas law deserves mention. It puts the burden of proof on a local government to defend a redevelopment transfer. Local governments bear the burden to prove that transfers are *not* for the sole purpose of promoting general economic development. *Id.* § 2206.001(e).

In April 2006, Illinois passed a law effectively barring *Kelo*-style takings by limiting condemnations for private development only to blight condemnations.⁴⁵

This view tries to strike a compromise between the pure pro-redevelopment and pro-property views by drawing a hard-and-fast line between “blight” and “redevelopment” takings. On this view, neither legislatures nor courts are particularly competent to second-guess whether type I or II errors prevail in particular cases. At the same time, there are at least a few reasons for making a legislative policy judgment distinguishing between the two types of condemnations. By definition, “blighted” properties have peculiar conditions. If homes are run-down, their owners are substantially less likely to have credible subjective values. Separately, “blight” could add a fifth factor to Merrill’s four, namely the negative externalities that crime- and disease-ridden properties inflict on the rest of a community.⁴⁶

III. THE PROCEDURAL ALTERNATIVE

A. *Eminent Domain and the Administrative-Process Critique*

Such are the alternatives a legislature might pursue if it wants to reconsider its eminent domain laws strictly on their merits. At the same time, however, there are important political reasons why legislatures might not want to pursue a solution strictly on the merits. As Part I conceded, private-to-private transfers raise many substantive issues that are hard to settle in specific and concrete ways. They also raise difficult comparative institutional competence problems. How well, after all, do private markets, courts, and local planning each solve the same land assembly problems? Politically, the debate unleashed by *Kelo* is still relatively new for legislators, academics, and policy specialists. My sense is that substantive laws cannot be changed until legislators, affected interests, and elites all arrive at a broad consensus concerning the right policy outcome. It is unlikely that any such consensus will be forthcoming. No interest in

45. Equity in Eminent Domain Act, S.B. 3086, 94th Gen. Assem. § 5 (Ill. 2006) (effective Jan. 1, 2007), available at <http://www.ilga.gov/legislation/94/SB/PDF/09400SB3086lv.pdf>.

46. *Kelo*, 125 S. Ct. at 2674 (O’Connor, J., dissenting).

the debate has fully convincing arguments, and most have plausible arguments from one of the four alternatives sketched in Part I.

If so, then it is more fruitful for legislators to consider procedural reforms. If legislators cannot draw bright lines to define when a private-to-private transfer is impermissible, perhaps they can agree on procedures that rationalize the eminent domain process. To be sure, procedural reforms are not totally substance-free. They usually reflect some background assumptions about how to balance competing error costs and policy goals. Even so, procedural reforms can help. Sound procedure can give government officials discretion to choose ends and focus on whether those officials have chosen means that intelligently accomplish those chosen ends.

One of the most important of such procedural reforms occurred in state and federal administrative law during a period running roughly from 1960 to 1980. Cass Sunstein calls this period the era of "critique of administrative process."⁴⁷ This was a period of reaction against the tendencies written into Progressive and New Deal agency-enabling statutes that tended to confer broad policy-making discretion to agency regulators. Starting in the early 1960s, however, libertarian/conservative economists and progressive legal academics and policy reformers all became skeptical that agency regulators genuinely regulated in the public interest. From different perspectives, these various critics suspected that regulators were influenced substantially by "public choice" factors, by pressures from the economic interests they were supposed to be regulating in the public interest.⁴⁸ In response, courts developed procedural doctrines that forced agencies to justify their decisions to the public in greater detail. These procedural requirements were supposed to force agencies to spell out the thinking behind their policy decisions such that courts could determine whether their decisions were motivated by concern for the public interest or the economic concerns of special interests.

47. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 26 (5th ed. 2002).

48. See *id.* at 27-28; GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 257-65 (3d ed. 2004); see also ROGER G. NOLL, *REFORMING REGULATION* 40-46 (1971).

This transformation also somewhat influenced the law of zoning. In the 1960s and 1970s, some jurisdictions developed "spot zoning" doctrines to prevent local city councils and planners from abusing the zoning amendment process for public-choice reasons. One can see the themes of the 1960s procedural critique in the 1973 spot zoning decision of *Fasano v. Board of County Commissioners*.⁴⁹ In *Fasano*, the Oregon Supreme Court respected the general rule whereby local land-use regulatory decisions are treated as legislative determinations; it recognized that the "policy determinations and guiding principles" expressed in ordinances and comprehensive plans are presumptively entitled to deference unless they are arbitrary and capricious.⁵⁰

However, the court also warned that it "would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity."⁵¹ In particular, the court saw differently cases in which a local council or planning commission uses its amendment powers to draw a small zone specially for the benefit of a noisy use in a quiet neighborhood. Those cases raised the specter of the "almost irresistible pressures that can be asserted by private economic interests on local government."⁵² The *Fasano* court therefore designated such local decisions as "quasi-judicial" and created a set of procedures similar to those being developed generally in state and federal administrative law.

To be sure, state courts and commentators did not follow *Fasano* as enthusiastically as federal courts and commentators embraced the administrative-process critique in federal administrative law.⁵³ Still, *Fasano* confirms that state judges have been receptive to the administrative-process critique, and that the critique can apply to local land-use regulation.

There has been no revolution in eminent domain

49. *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23 (Or. 1973).

50. *Id.* at 26-27.

51. *Id.* at 25-26.

52. *Id.* at 29-30.

53. See, e.g., DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 544-48 (6th ed. 2005) (documenting arguments for and against quasi-judicial review and the jurisdictions that have embraced each).

procedure similar to the procedural revolution effected in zoning law by spot zoning doctrine. Again, state courts occasionally invalidate condemnations that seem inappropriately influenced by special interests on the basis of constitutional public use guarantees. For example, a 2002 Illinois case, *Southwest Illinois Development Authority v. National City Environmental*, used deferential public use precedents to invalidate a quick-take from a recycling facility to a racetrack on the ground that it was unlikely that “the agency’s true intentions were . . . clothed in an independent, legitimate governmental decision to further a planned public use.”⁵⁴ But constitutional public use law does not by itself create a record, procedural rights, or decision-making requirements. Those requirements are more properly the province of administrative procedures and judicial case development.

Administrative law procedural reforms may screen out many of the projects that have stoked the backlash against *Kelo* without forcing legislators to settle the substantive policy choices raised in Part I. I am not aware of any states that have yet passed laws implementing such a compromise in a fully-developed fashion, but many state legislators have proposed bills that illustrate how different compromises might look. This Part surveys examples illustrating different tools of non-deferential judicial review.

B. Procedural and Evidentiary Requirements

To begin, consider the basic procedural and evidentiary requirements that *Fasano* imposed on quasi-judicial actions. To balance the gains from public action against the risk of special-interest influence, *Fasano* imported into land use law many staples of notice-and-comment review from administrative law. *Fasano* required local governments to lay a record with adequate findings for subsequent judicial review.⁵⁵ It imposed the burden of proof on the government body seeking to initiate change.⁵⁶ It required the government body to document the means-ends “fit” between the spot zoning and the government policy—that there exists a public

54. *Sw. Ill. Dev. Auth. v. Nat’l City Envtl.*, 768 N.E.2d 1, 10-11 (Ill. 2002).

55. *Fasano*, 507 P.2d at 29-30.

56. *Id.* at 28-30.

need and that the need will be best served by the action proposed.⁵⁷ *Fasano* also guaranteed parties affected by a proposed action a right to be heard, a right to present and rebut evidence, and a right to an impartial tribunal.⁵⁸

Requirements like those in *Fasano* can be codified. For example, Congress codified many of the major developments in notice-and-comment rulemaking in the Clean Air Act Amendments of 1977, which substituted for the general requirements of the federal Administrative Procedure Act its own specialized notice-and-comment requirements.⁵⁹ At least a few post-*Kelo* bills and laws have started to consider revising the standards and procedures for judicial review. For example, the recently-passed Georgia law places on the condemning government the burden of proving that a condemnation is in fact a condemnation for a public use.⁶⁰ Michigan legislators have taken a slightly different tack. Some have proposed a constitutional amendment that sets a preponderance of the evidence standard for establishing a public use, and a clear and convincing standard for cases in which property is transferred to a private developer after a blight condemnation.⁶¹

Even so, state legislators have not sufficiently explored the possibilities that procedural reforms have to offer. For example, the Georgia and Michigan proposals say little about parties' rights to introduce and rebut evidence, or the records that local governments ought to compile to facilitate meaningful judicial review. There is more room to develop procedural rights to make local governments demonstrate that their redevelopment plans are meant to promote their communities' general economic interests and not the private interests of developers.

C. *Impact Statements and Particularized Findings*

Another possibility is to include in state redevelopment

57. *Id.* at 27-28.

58. *Id.* at 29-30.

59. 42 U.S.C. § 7607(d) (2000).

60. GA. CODE ANN. § 22-1-1 (West 2006); *see also supra* text accompanying notes 32-34 (discussing the Georgia statute).

61. Sen. J. Res. E, 93d Leg., 1st Reg. Sess. § 2 (Mich. 2005), *available at* [http://www.legislature.mi.gov/\(u15myz452fonjteffexo5045\)/mileg.aspx?page=getobject&objectname=2005-SJR-E&queryid=15081060](http://www.legislature.mi.gov/(u15myz452fonjteffexo5045)/mileg.aspx?page=getobject&objectname=2005-SJR-E&queryid=15081060).

enabling statutes a checklist of factors that local governments must consider before deciding to transfer condemned land to private parties. Such factors often appear in federal enabling statutes. One of many examples is a provision of the Communications Assistance for Law Enforcement Act, which requires FCC rules to consider statutory criteria relating to cost-effectiveness, privacy, the cost to residential consumers, and technological innovation.⁶² Factors like these give courts specific criteria to use when determining whether an agency has conducted a thorough policy analysis while making a decision in its discretion.⁶³ Such factors can also come in the more restrictive form of a legally-required impact statement; M. Timothy Iglesias proposes such an "Eminent Domain Impact Statement" along these lines.⁶⁴

Whenever governments use eminent domain to transfer private property to private owners not regulated as common carriers, state law could require them to make particularized policy findings. Courts could then review those policy findings on an abuse of discretion standard. Local governments would receive deference as long as they reasonably documented findings of fact and reasonably identified and explained the assumptions behind significant policy choices. While these findings could come in several forms, three of Merrill's four factors provide a helpful framework.⁶⁵

- *Benefits*: How great are the expected economic benefits from the assembly contemplated? If these benefits are not certain to be realized, what is the possible range of benefits, and what are the odds that different benefits will realize along that range?
- *Compensation shortfalls*: How many affected owners stand to lose subjective values above

62. 47 U.S.C. § 1006(b).

63. See, e.g., *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).

64. See M. Timothy Iglesias, *The Other Kelo Problem: Protecting the Public from "Eminent Domain Abuse,"* 15 WM. & MARY BILL RTS. J. (forthcoming 2006) (draft outline on file with *Santa Clara Law Review*).

65. I disregard here the rent-seeking argument. I assume it would be extremely unbecoming for state legislators to require local officials to make rent-seeking findings. In particular, imagine a local planning agency determining to what extent a local project might encourage developers to pay rent and local officials to extract it.

market compensation? How many affected owners value their properties significantly above market value because they have made special investments in those properties that have not yet been realized? Do relocation assistance and other government benefits lessen the impact of these possible costs? If these subjective and investment shortfalls are not certain to occur, what are the possible ranges of shortfalls, and how likely are different shortfalls along the range?

- *Impact on land markets:* Have the government and interested developers tried to acquire the land they need through private market mechanisms? What alternatives were tried, and what alternatives were deemed not worth trying? If the condemnation in question is approved, to what extent will it discourage developers generally from buying land on private markets?

One could add other factors, such as findings about whether a condemnation might affect different races or socio-economic classes differently.⁶⁶ Even so, the considerations listed here provide a good starting point.

D. General Considerations

Let us consider a few questions common to these various reforms. To begin with, how do these procedures relate to the various substantive alternatives considered in Part I? Sophisticated lawyers know that procedural rules usually have substantive implications. If forced to choose, I would guess that these reforms track the attitudes of deference with "bite." Unlike the anti-redevelopment approach or Epstein's, Somin's, and my view, these reforms do not limit the ends for which local governments may order private-to-private transfers. These reforms are noticeably less deferential than current practice because they require local officials to document their actions, their factual findings, and their policy determinations to a far greater degree than arbitrary and capricious standards do in most jurisdictions now. The procedural reforms proposed here are probably slightly less deferential than deference with "bite" as Merrill and others

66. See Iglesias, *supra* note 64, at 1-2.

have described it. The “bite” in contemporary public use cases is unpredictable. Judges may invoke it when a particular private-to-private transfer seems improper, but judges are not required by hard doctrinal rules to apply that bite consistently from one public-use challenge to the next. Evidentiary, cross-examination, and particularized-findings requirements, by contrast, give courts requirements to impose on local governments regularly.

If these procedural reforms correspond to deference with “bite,” they are subject to the criticisms lawyers and scholars associate with such deference. Thus, scholars like myself who prefer the narrowest view of private-to-private transfers will not find such reforms satisfactory. At the same time, the best should not become the enemy of the good. One important constituency *against* the anti-*Kelo* drive ongoing in state legislatures consists of elite lawyers and policy planners who view vigorous local agency action as necessary and constructive. Such elites should find acceptable the procedural reforms presented herein. These reforms are common fixtures of administrative law practice generally. They are widely respected and agreed on by administrative-law scholars. Many who do not want to tie agencies’ hands unnecessarily still are concerned that agencies are subject to capture. For such scholars, these procedures strike the right balance between judicial vigilance and overreach. The land-use bar could also adapt to these requirements fairly easily. Even though many jurisdictions do not follow the *Fasano* approach in spot zoning, land-use lawyers are familiar with this approach and respect it even when they disagree with it.

There are two other objections to consider. Some might say that these procedural reforms are too onerous. Evidentiary and procedural rights are sure to make private-to-private transfers slower and more expensive for local governments. Impact statements create choke points at which opponents of government action can stall, demand more evidence, and litigate, as has happened with federal and state environmental impact statement requirements.⁶⁷ The

67. See, e.g., NAT’L ACAD. OF PUB. ADMIN., MANAGING NEPA AT THE DEPARTMENT OF ENERGY (1998), available at http://www.eh.doe.gov/nepa/process/napa_rep/napa_rep.html; see also Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903 (2002).

United States Supreme Court and state courts have laid down similar procedural and means-ends requirements on “exactions,” bargains in which local governments give zoning development permits or variances to owners on condition that the owners dedicate land to the governments.⁶⁸ Pro-government land-use scholars have complained that these requirements have slowed government land-use planning;⁶⁹ the same charge could justly be made of the requirements considered here.

Others, by contrast, might say that these procedural reforms are not onerous enough—that they are futile. They might worry that redevelopment agencies and developers could easily backfill the administrative record if they were determined enough to see private-to-private transfers approved. After *Kelo* was decided, for instance, a local newspaper learned by Freedom of Information Act requests that, contrary to its public position, the Pfizer Corporation had cooperated closely with New London city officials to plan the redevelopment of the area targeted for condemnation.⁷⁰

Even so, these procedural reforms might be just right. I am certain that the evidentiary and other requirements discussed here would make it easier for opponents of a proposed development to criticize development plans like the New London plan litigated in *Kelo*. If the burden of production is on a locality, the locality must produce evidence for opponents to consider, criticize, and rebut. If there are discrepancies in the locality’s policy arguments, the opponents may raise them; if the locality does not address them, the means-ends analysis in these reforms provides courts with automatic grounds for vacating proposed agency actions. At the same time, I doubt these requirements are too costly. There is always some trade-off between procedure and substance, and it is usually difficult to quantify such trade-offs in a concrete way. If a statute does not require findings, it encourages condemnations generally, even when they are

68. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

69. See, e.g., Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 245-46 (2004).

70. See Todd Zywicki, *Pfizer’s Role in Kelo Takings*, THE VOLOKH CONSPIRACY (Oct. 24, 2005), http://volokh.com/posts/chain_1130160017 (last visited Sept. 4, 2006).

not cost-justified. If a statute requires findings, the extra procedure burdens all condemnations, both justified and unjustified. Until land-use specialists develop a foolproof way to determine whether private-to-private transfers generate more type I or type II errors as suggested in Part I, legislators and policy specialists will need to make an educated legislative guess where to strike the balance.

While these procedural reforms are only part of my ideal solution, I believe there are at least two good reasons for thinking that these reforms strike a balance that ought to be both socially constructive and politically stable. First, if the opinions of administrative-law and land-use elites are probative, these reforms strike the right balance between preventing serious public-choice problems and tying local government's hands. Second, while we still do not know how the debate over *Kelo* will ultimately be resolved, we do know that the general public is irate at *something* about *Kelo*. It is reasonable to suspect that one important factor stoking the backlash against *Kelo* is a general suspicion that local governments are tied too closely too developers. In the absence of more compelling reasons, these elite and public opinions should serve as useful justifications for legislative reform.

IV. CONCLUSION

Many state legislatures are considering proposals to overhaul the substance of their eminent domain, blight, and redevelopment laws. At least as a first step, these legislatures might want to stop arguing over substance and consider procedural reforms similar to the reforms now typical in federal administrative law and state quasi-judicial spot zoning law. The substantive issues are intractable, and different constituencies in the eminent domain debate are strongly attached to one or the other of the main substantive alternatives. By contrast, eminent domain statutes on the books do not provide many details about parties' procedural rights, and they codify very deferential standards of judicial review. These statutes seem out of date because elite and public attitudes toward government regulation have grown more suspicious of rent-seeking and capture problems than when such statutes were drafted. Such suspicions surely inform the current public hostility toward the *Kelo* decision.

If those elite and public attitudes are valid, procedural reforms should improve local practices for private-to-private transfers in ways that are both socially constructive and politically sustainable.